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No.

IN THE

Supreme Court of the United States

October Term, 1982

EUGENE H. EUSTER, SAMUEL FIERAMOSCA, DANIEL LOPEZ, DAVID HASBANY and MARTIN J. FALLON, JR.,
Petitioners

v.

PENNSYLVANIA HORSE RACING COMMISSION; ANDREW R. JOHNSON, Chairman, and A. MARLYN MOYER and WILLIAM D. GROSS, Commissioners,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is the action of the Pennsylvania Horse Racing Commission in promulgating a rule specifying jockey fees, pursuant to and in accordance with its power to "supervise generally" horse racing in Pennsylvania, *ipso facto* exempt from the federal antitrust laws in the absence of affirmative and express language indicating legislative contemplation of such action?

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The opinion of the Court of Appeals, attached hereto in Petitioners' Appendix ("P. App.") at P. App. A1, is reported at 677 F. 2d 992, 1982-2 Trade Cas. (CCH) ¶ 64,734 (3d Cir. 1982). The opinion of the District Court, attached hereto at P. App. A14-A20, is not reported.

JURISDICTION

The judgment of the Court of Appeals (attached hereto at P. App. A21-A22) was entered on May 17, 1982; the petition for rehearing was denied on June 24, 1982 (P. App. A23). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

The statute involved, § 1 of the Sherman Act, 15 U. S. C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

STATEMENT OF THE CASE

A. Statement of the Facts

In 1967, Pennsylvania legalized pari-mutuel betting on thoroughbred horse racing. In the same year, the Pennsylvania Horse Racing Commission (the "Commission") was established by the Pennsylvania Legislature to regulate racing on which pari-mutuel betting was conducted. The Rules of Racing adopted by the Commission in 1968 included Rule of Racing 9.15, which prescribed a schedule of fees to be paid jockeys (the "Rule").

Ten years later, the Jockeys' Guild, Inc., an association composed of jockeys, requested that the Commission amend the Rule to reflect the new, significantly higher jockeys' fee schedule which had been agreed upon by the Guild's membership. The Commission adopted the revised fee schedule as requested by the Guild.

In 1979, petitioners brought the instant action challenging the amendment of the Rule under, *inter alia*, § 1 of the Sherman Act, 15 U. S. C. § 1. The district court properly exercised jurisdiction over this matter pursuant to 15 U. S. C. §§ 15 and 26.

B. The Proceedings Below

Shortly after the instant action was filed, respondents moved to dismiss the antitrust count of petitioners' Complaint pursuant to F. R. Civ. P. 12(b)(6) on the ground, *inter alia*, that the amendment of the Rule was exempt under the "state action" doctrine first recognized by this Court in *Parker v. Brown*, 317 U. S. 341 (1943). The district court denied that motion, relying in part on the decision of the Commonwealth Court of Pennsylvania in *Gilligan v. Pennsylvania Horse Racing Comm'n*, 46 Pa. Commonw. Ct. 595, 407 A. 2d 466 (1979), which held that the Commission had exceeded its authority under state law when it promulgated the Rule.

In September of 1980, the Supreme Court of Pennsylvania reversed the Commonwealth Court's decision in the *Gilligan* case, holding that the Commission had the power, under state law, to promulgate the Rule. *Gilligan v. Pennsylvania Horse Racing Comm'n*, 492 Pa. 92, 422 A. 2d 487 (1980). Respondents then renewed their motion (styled as a motion for summary judgment) for dismissal of the instant action, again on the basis of the *Parker* doctrine.

The district court granted summary judgment in favor of respondents pursuant to F. R. Civ. P. 56 on the ground that the action was barred by the "state action" doctrine. Recognizing that the appropriate test for the application of the state action exemption is that set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980),[1] the district court concluded that the Rule was exempt, or, more precisely, that the respondents were immune from the antitrust laws with regard to the adoption of the revised fee schedule. The heart of the lower court's opinion—concerning the first prong of the *Midcal* test—was the court's citation of and reliance on the Pennsylvania Supreme Court's opinion in *Gilligan*.

The Court of Appeals affirmed the district court's grant of summary judgment in favor of the respondents. Finding the district court's ruling "amply justified" by the Pennsylvania Supreme Court's opinion in *Gilligan*, the Court of Appeals concluded that respondents' amendment

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1. In *Midcal* this Court held that its decisions established a two-pronged test for immunity under *Parker*. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal* at 105 (*quoting City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of Brennan, J.)).

of the Rule was exempt from antitrust scrutiny by virtue of the state action doctrine.

The Court of Appeals' analysis regarding the first prong of the *Midcal* test consisted of two steps. First, the Court of Appeals noted that under *Gilligan*, the Commission undoubtedly had the power to enact the Rule as a matter of state law, because it was within the "broad supervisory powers" and "general rule making power" which were "clearly and unmistakably conferred" by the legislature. 677 F. 2d at 994 (P. App. A6) (*quoting Gilligan*, 492 Pa. at 96, 97, 422 A. 2d at 489, 490). Second, the Court of Appeals concluded that the promulgation of the Rule met the first prong of *Midcal* because it was "clearly contemplated by the legislation in question." 677 F. 2d at 995 (P. App. A7).[2]

2. The Court of Appeals' opinion quotes (as did the district court) the following passage from *Gilligan*: "[t]he imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with—indeed, necessary to accomplish—these legislative goals." 677 F. 2d at 995 (P. App. A7) (*quoting Gilligan*, 492 Pa. at 98, 422 A. 2d at 490-91). Petitioners conceded below that if it could be established that the Rule was in fact "necessary to accomplish" the goals of the legislature, then legislative contemplation of the Rule could be inferred. Petitioners argued, however, that this factual assertion in *Gilligan* could not control the instant action for a variety of reasons (See note 5, *infra*); they suggested that if respondents' defense was predicated upon "necessity," a genuine dispute of fact precluded summary judgment.

The Court of Appeals did not address these arguments, but rather suggested that this factual inquiry would be irrelevant and improper: "[t]he state action doctrine was developed to avoid this sort of inquiry by federal courts into state legislative wisdom. In *Parker* itself, for example, the Supreme Court did not inquire into the necessity for, or wisdom of, the California marketing programs . . . ." 677 F. 2d at 997 (P. App. A12). Although this discussion misses the mark (since petitioners do not question "state legislative wisdom"), the significant point is that it is apparent, given this discussion of the relevance of "necessity," that the Court of Appeals did not base its decision on this "fact."

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court of Appeals for the Third Circuit Below Is in Conflict With Decisions of the Courts of Appeals for Other Circuits.

The decision of the Court of Appeals should be reviewed by this Court because it conflicts with decisions of other Courts of Appeals. In particular, the decision below in the instant action conflicts with *United States v. Texas State Bd. of Public Accountancy*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979).

In *Texas State Board*, the Court of Appeals for the Fifth Circuit affirmed, on the basis of the lower court's opinion, a determination that Rule 14 of the Texas State Board of Public Accountancy was not exempt by virtue of the state action doctrine. The Board was a state agency; its acknowledged power to enact rules regulating accountants in Texas was derived from § 5 of the Texas Public Accountancy Act of 1945, which provided in relevant part that the Board "may promulgate, and may amend from time to time, rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy." Tex. Rev. Civ. Stat. Ann. Art. 41a § 5 (Vernon 1969). Nevertheless, the district court held (and the Court of Appeals affirmed) that Rule 14 was not entitled to exemption:

> In the instant case Rule 14 is not mandated by any state regulation or action. Section 5 of the Accountancy Act is cast in permissive, not mandatory, language, and, furthermore, only allows adoption of Rules appropriate for maintenance of high standards of integrity in the Accountancy profession. Nowhere in the Act does the State as sovereign mandate the

> anticompetitive conduct required by Rule 14, nor is such policy dictated by the State. Additionally, it cannot be said Section 5 of the Act in any way concerns or contemplates "the kind of action complained of" here.

United States v. Texas State Bd. of Public Accountancy, 464 F. Supp. 400, 404 (W. D. Tex. 1978), *aff'd as modified*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979). Over the dissent of Judge Gee, the Court of Appeals adopted the district court's opinion with only a slight modification in the relief granted.[3]

As in *Texas State Board*, the relevant legislation in the instant action is silent as to the restraint alleged. Nevertheless, the Court of Appeals for the Third Circuit has concluded that the restraint is "contemplated" by the "legislation" because it is permissible as a matter of state law, and therefore the first prong of the *Midcal* test is met. This result is clearly in conflict with *Texas State Board*, which suggests that the question is not whether the restraint is "contemplated by the legislation," but rather whether it is contemplated by the state as sovereign, *i.e.*, by the legislature.[4]

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3. There is also conflict between the decision below and the Fifth Circuit's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 532 F. 2d 431 (5th Cir. 1976), *aff'd*, 435 U. S. 389 (1978). The Fifth Circuit held in that case that a "subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws." 532 F. 2d at 434 (footnote omitted).

4. *Ronwin v. State Bar of Arizona*, 1981-2 Trade Cas. (CCH) ¶ 64,414 (9th Cir. 1981), *withdrawn and reh. granted*, July —, 1982 also conflicts with the decision of the Court of Appeals in the instant action. Although the panel decision in that case can no longer be said to contribute to a conflict among the Courts of Appeals, because it has been withdrawn, its reasoning clearly parallels that of the Court of Appeals for the Fifth Circuit in *Texas*

There is also tension, if not direct conflict, between the decision of the Court of Appeals for the First Circuit in *Corey v. Look*, 641 F. 2d 32 (1st Cir. 1981), and the analysis of the Court of Appeals in the case at bar. In *Corey v. Look*, the Court of Appeals reversed a lower court determination that an alleged agreement between two public entities was exempt from antitrust attack. The Court held that:

> Although "specific, detailed legislative authorization" is "not . . . necessarily" required, . . . we think that, absent explicit language, the political subdivision claiming exemption must illustrate the requisite state legislative intent by demonstrating by convincing reasoning that the challenged restraint is necessary to the successful operation of the legislative scheme that the state as sovereign has established.

Id. at 37. Of course, no demonstration of "necessity" was made in the instant action, or in the state court decision by which the Third Circuit purports to be guided.[5] *See* note 2, *supra*.

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4. (Cont'd.)

State Board, with slightly different emphasis. *See Ronwin v. State Bar of Arizona*, 1981-2 Trade Cas. (CCH) ¶ 64,414 (restraint not immune in the absence of a clear articulation adopting the restraint by the state policymaker, as opposed to a subordinate state agency).

5. The *Gilligan* appeal arose from denial of a motion for judgment on the pleadings. The issue of "necessity" was not before the Pennsylvania Supreme Court, and there was no record before either the court or the Commission which could have supported such a finding. In any event, petitioners, who were not parties in *Gilligan*, could not be bound by a finding of fact in that action.

B. The Ruling Below Is in Conflict With Decisions of This Court.

The decision of the Court of Appeals is in conflict with decisions of this Court pertaining to the state action exemption, notably *Goldfarb v. Virginia State Bar Ass'n*, 421 U. S. 773 (1975) and *Community Communications Co., Inc. v. City of Boulder*, 102 S. Ct. 835 (1982). Furthermore, the nature of the decision is such that it will have significant impact beyond the bounds of the instant action.

The Third Circuit effectively ruled below that a rule promulgated by a state commission which is within that commission's authority as a matter of state law is *ipso facto* exempt from the application of the antitrust laws. The logic of the proposition is beguiling. If a rule is within the commission's power it must be "contemplated by the legislation"; if the rule is "contemplated by the legislation," then the legislature must have "contemplated the kind of action complained of." *See City of Lafayette v. Louisiana Power & Light Co.*, 532 F. 2d 431, 434 (5th Cir. 1976), *aff'd*, 435 U. S. 389 (1978). The Third Circuit goes on to conclude that if the legislature "contemplated" the alleged restraint in this way, then the first prong of the test set forth in *Midcal*—that the "challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy' "—is met.

This argument was rejected by this Court when made on behalf of a municipality in *Boulder*. This Court noted that "[a]cceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear

articulation and affirmative expression' that our precedents require." 102 S. Ct. at 843.[6]

The Court of Appeals in the instant action attempted to distinguish *Boulder* in a footnote:

> The recent Supreme Court decision in *Boulder* is not controlling here . . . . In this case, we are faced with the question whether a state agency, not a municipality, is entitled to the *Parker* exemption when it acts within its authority under state law . . . .

677 F. 2d at 996, n. 6 (P. App. A9). The Court goes on to suggest that the distinction between the instant action and *Boulder* is that the Commission in the instant action acted "within the *sovereign authority* of the Commission under *state* law." *Id.* (emphasis in original).

The City of Boulder also made this argument, suggesting that under state law it acted "as the state," *i.e.*, with sovereign authority, in local affairs. Apparently accepting this proposition *arguendo*, this Court nevertheless rejected the argument as follows:

> As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with "the Government of the United States, or [with] the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are

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6. In a recent, thorough analysis of these issues, Professor William H. Page has concluded, "Clear articulation cannot refer to vague language in a legislative history or a statutory preamble . . . ." *Antitrust, Federalism and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*," 61 B. U. L. Rev. 1099 (1981) (hereinafter cited as "Page").

all derived from, or exist in, subordination to one or the other of these." *United States v. Kagama*, 118 U. S. 375, 379, 30 L. Ed. 228, 6 S. Ct. 1109 (1886) (emphasis added).

102 S. Ct. at 842.

Notwithstanding the fact that the Pennsylvania Horse Racing Commission, like a municipality, is an "organized bod[y] with limited legislative functions" which is derived from and subordinate to the legislature of the Commonwealth of Pennsylvania, the Court of Appeals chose not to apply the holding of *Boulder* to the case at bar. There is no principled basis in the precedents of this Court for distinguishing between state agencies and municipalities—both creations of the sovereign—for the purpose of applying the state action exemption. As this Court has held, "not every act of a state agency is that of the State as sovereign." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978).[7]

In *Boulder* this Court noted that "the availability of the *Parker* exemption is and must be a matter of federal law." 102 S. Ct. at 841, n. 15. The Third Circuit's decision would nullify this principle and convert the availability of the *Parker* exemption to a question of whether an agency is acting within its authority as a matter of *state* law. 677 F. 2d at 996, n. 6 (P. App. A9).

This Court's decision in *Goldfarb* also suggests that state agencies acting within their powers under state law may be subject to the antitrust laws. In *Goldfarb*, the respondent Virginia State Bar Association was "a state agency by law," at least for "some limited purposes." 421

7. "[N]othing inherent in the nature of the administrative process itself offers an independent basis for according administrative bodies special deference," in applying the *Parker* doctrine because "administrative bodies, like cities, must derive whatever authority they have from the state." Page, *supra*, at p. 1129.

U. S. at 790, 791. Among the powers granted the State Bar was the power to issue ethical opinions, 421 U. S. at 791; the issuance of ethical opinions regarding fee schedules was the primary anticompetitive activity for which the State Bar was challenged. Although the issuance of ethical opinions was within the State Bar's powers as a matter of state law (and apparently, therefore, one of the purposes for which it was a state agency), the Court nevertheless held that the restraint created by the State Bar's exercise of those powers was not exempt from the application of the antitrust laws. The basis for that decision was concisely stated: "[i]t is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U. S. at 791.

In *Goldfarb*, the state agency was empowered, as a matter of state law, to take "the kind of action complained of" in the sense that it had the authority to issue ethical opinions. There was, however, no indication—clear, express or otherwise—that the sovereign contemplated "the kind of action complained of" in the sense that it contemplated anticompetitive restraints in the market at issue. The challenged actions were therefore not entitled to exemption; the same result should obtain in this case.

C. The Petition Presents an Important Question of Federal Law Which Should Be Specifically Addressed by This Court.

The fundamental flaw in the analysis of the Court of Appeals is that exemption depends not on a conscious decision of the state policymaker, but on the breadth of the delegation from the policymaker to the subordinate state agency. *Parker* contemplates the sacrifice of federal policy favoring competition to federalism; it does not con-

template the sacrifice of federal policy to state administrative convenience.[8] The instant action provides the Court with an opportunity to clearly establish this point.

The last seven years have produced substantial and sometimes confusing developments in the relationship between the antitrust laws and the principles of "our Federalism." The resolution of many specific questions regarding the *Parker* doctrine and federal preemption of state regulation has clarified this relationship somewhat, but several complex analytical problems are yet to be resolved. Among those questions is the extent to which actions of state regulatory agencies must conform with the paramount federal policy favoring competition. As petitioners have explained above, they submit that the Third Circuit's analysis is at odds with the principles laid down in this Court's prior decisions with respect to private parties and municipalities; however, the application of *Parker* to state agencies has not been expressly delineated.

The Court of Appeals below avoided any express consideration of the competing arguments on this issue, holding that Parker precludes application of the antitrust laws to actions of a state regulatory agency acting within a broad delegation of authority from the legislature. In short, the Court of Appeals determined that state agencies acting properly as a matter of state law need not abide by the antitrust laws.

The importance of this issue as a matter of federalism is illustrated by the conflict between the Third Circuit's analysis and the positions taken by the Attorney General

8. Professor Page states that this Court's decisions "requir[e] states clearly to express clearly their regulatory choices as sovereigns, rather than through administrative agencies," Page, *supra* at p. 1101,, and that the *Midcal* test of clear articulation "recognizes only a state's legislation or rulings of its highest court as authoritative sources of state regulatory policy." *Id.* at 1118. *See Ronwin*, 1981-2 Trade Cas. ¶ 64,414 at p. 75,030.

of the United States, as well as positions taken by attorneys general of many states, on similar questions. Within the past six months the United States Department of Justice has reaffirmed the position it took in *Texas State Board* in threatening suit against certain anticompetitive rules of the West Virginia Board of Accountancy; the Department of Justice refrained from filing suit only after receiving assurances that the rules in question would be rescinded. *See* Trade Reg. Report (CCH) No. 542 (May 17, 1982), p. 10. Several state attorneys general have opined that rules promulgated by state agencies within broad grants of authority would not be shielded by the *Parker* doctrine. *See, e.g., Opinion of the Attorney General of Delaware*, Opinion No. 80F-006, 1980-1 Trade Cas. (CCH) ¶ 63,259 (March 20, 1980);[9] *Opinion of the Attorney General of Vermont*, Opinion No. 24-80, 1979-2 Trade Cas. (CCH) ¶ 62,912 (September 6, 1979). The conflict between the determination of the Court of Appeals and federal enforcement policy (as well as the opinions of various state attorneys general) underscores the need for a definitive determination by this Court of the question presented in this petition.

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9. In an opinion requested by two state legislators regarding the impact of *Midcal* on Delaware's retail price maintenance system for liquor, Delaware's Deputy Attorney General William E. Kirk, III, wrote:

> Although the Alcoholic Beverage Control Commission is empowered by statute to promulgate rules to establish control over the business of the sale of liquor in Delaware, including the time, place, and manner of sale [4 Del. C. § 304(a)(2) and (5)], we do not believe the statute provides a clear and affirmative articulation of a state policy in favor of resale price maintenance, nor do we believe that a reviewing court would find such an articulation. In the absence of a statute directing such a system, we believe that the first test under *Midcal* is not met.

1980-1 Trade Cas. (CCH) ¶ 63,259 at p. 78-276.

CONCLUSION

For all of the foregoing reasons, petitioners request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2432

EUSTER, EUGENE H.; FIERAMOSCA, SAMUEL; LOPEZ, DANIEL; HASBANY, DAVID; and FALLON, MARTIN J. JR.

Appellants

v.

EAGLE DOWNS RACING ASSOCIATION, a Pennsylvania Corporation; PENNSYLVANIA HORSE RACING COMMISSION; JOHNSON, ANDREW R., Chairman of Pennsylvania Horse Racing Commission; and A. MARLYN MOYER and WILLIAM D. GROSS, Commissioners of the Pennsylvania Horse Racing Commission

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 79-0265)

Argued March 2, 1982

Before: HUNTER, WEIS and HIGGINBOTHAM, *Circuit Judges*
(Opinion filed May 17, 1982)

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OPINION OF THE COURT

HUNTER, *Circuit Judge.*

1. This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania granting defendants' motion for summary judgment. Plaintiffs-Appellants are owners and trainers of thoroughbred race horses in Pennsylvania. They brought this antitrust action against the Pennsylvania Horse Racing Commission (the "Commission") and its members challenging the Commission's rule which sets the fees to be paid to jockeys who ride at racetracks in the Commonwealth. Specifically, plaintiffs allege that the rule violates Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] Defendants moved

1. 15 U.S.C. § 1 states in relevant part:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

for summary judgment in the district court, pursuant to Fed. R. Civ. P. 56, on the ground that the "state action" exception to the antitrust laws enunciated in *Parker v. Brown*, 317 U.S. 341 (1943) precludes Commission liability.[2] The district court entered an order and judgment, supported by a memorandum opinion, granting the motion for summary judgment. We will affirm.

FACTS AND PROCEDURAL HISTORY

2. The Pennsylvania legislature enacted the Pennsylvania Horse Racing Act in 1967. 15 P.S. §§ 2651-2675 (1980). The Pennsylvania Horse Racing Commission was established pursuant to this Act and was given broad authority over horse racing and betting:

> Pursuant to the provisions of this act, the State Horse Racing Commission shall have power to supervise generally all thoroughbred horse race meetings in this State at which pari-mutuel betting is conducted. The commission may adopt rules and regulations not inconsistent with this act to carry into effect its purposes and provisions and to prevent circumvention or evasion thereof.

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1. (Cont'd.)

several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

2. Defendants also premised their summary judgment motion on the ground that the injunctive and monetary relief sought against the Commission and its members was barred by the Eleventh Amendment. Because the district court granted summary judgment on the basis of the *Parker* doctrine, it did not reach the question of whether the Eleventh Amendment barred the lawsuit. Neither do we.

15 P.S. § 2652(a) (1980). The present appeal focuses on one such rule, Rule of Racing 9.15 ("Rule 9.15"). Rule 9.15 contains a jockey fee scale which was initially promulgated by the Commission in 1968 and was amended in 1978 to increase the schedule of fee payments. Appendix at A-22.

3. Shortly before this action was filed in the district court, the Pennsylvania Division of the Horseman's Benevolent and Protective Association, which represents owners-trainers of racing horses at various tracks in Pennsylvania, and three other individuals filed a lawsuit in the Commonwealth Court of Pennsylvania challenging the authority of the Commission to promulgate a rule setting the fees to be paid to jockeys. The Commonwealth Court held that the Commission exceeded its legislative authority and could not regulate the amount of compensation paid to jockeys. *Gilligan v. Pennsylvania Horse Racing Commission*, 46 Pa. Commw. Ct. 595, 407 A.2d 466 (1979). After the Commonwealth Court's decision, the district court rejected the defendants' argument that the state action exemption of *Parker* applied, relying on the decision of the Commonwealth Court in the *Gilligan* case.

4. The Commission then appealed the Commonwealth Court's decision to the Supreme Court of Pennsylvania. In September 1980, the Supreme Court reversed the Commonwealth Court, holding that the Commission was authorized by the legislature to promulgate a jockey fee schedule. *Gilligan v. Pennsylvania Horse Racing Comm'n*, — Pa. —, 422 A.2d 487 (1980). In light of the decision of the Pennsylvania Supreme Court, holding unambiguously that the Commission had authority to set jockey's fees, the district court held that the defendants were immune from antitrust liability under the *Parker* doctrine.

DISCUSSION

5. In *Parker*, the United States Supreme Court held that the Sherman Act was inapplicable to certain state action.[3] A raisin packer sued the California State Agricultural Commission to enjoin enforcement of the State's Agricultural Prorate Act. That Act authorized the State Director of Agriculture and the Agriculture Commission to adopt marketing programs regulating the sale of certain produce. The plaintiff attacked the program as violative of the Sherman Act. The Supreme Court held that state regulatory programs were immune from the proscriptions of the Sherman Act. The Court found no language or legislative history of the Sherman Act indicating congressional intent to proscribe the behavior of a sovereign state. The Court held that state regulatory programs could not violate the Sherman Act because the Act is directed against "individual and not state action." *Id.* at 352.

6. The *Parker* doctrine was recently discussed and reaffirmed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In *Midcal*, the Supreme Court set forth the appropriate standards for the state action exception as follows:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

445 U.S. at 105. If these two standards are satisfied, the challenged restraint is immunized from antitrust liability.

3. For a discussion of the historical background and origins of *Parker*, see Handler, "The Current Attack on the Parker v. Brown State Action Doctrine," 76 *Colum. L. Rev.* (1976). *See also* P. Areeda & D. Turner, 1 *Antitrust Law* 67-69 (1978); L. Sullivan, *Antitrust* 732-34 (1977).

7. The *Midcal* requirements are satisfied in the case before us. The ruling of the district court is amply justified by the Pennsylvania Supreme Court's decision in *Gilligan*.[4] In *Gilligan*, the court held that the Commission was authorized by the Horse Racing Act to promulgate the jockey fee scale at issue in this case. The court stated explicitly that the Act reflected a "clear legislative policy" to vest the Commission with broad supervisory powers over the "previously unlawful activity of thoroughbred horse racing." 422 A.2d at 489. The court stated:

> A pervasive system of regulation and supervision of the *otherwise criminal activity* was thus contemplated by the Commission's broad legislative mandate, and a general rule making power was clearly and unmistakably conferred.

422 A.2d at 490 (emphasis in original).

8. Furthermore, the court observed that the rule-making powers of the Commission should be construed liberally in light of the broad supervisory task necessary to accomplish the express legislative purpose:

> The breadth of the Commission's powers is required for the prevention of corruption and the maintenance of high standards and public confidence in racing.

---

4. The Supreme Court has repeatedly held that the highest court of a state is the ultimate interpreter of the state's statutes and that a federal court is bound by its construction. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975); American Railway Express Co. v. Kentucky, 273 U.S. 269, 272 (1927). State decisions are also controlling with respect to the interpretation of state administrative orders. Sutter Butte Canal Co. v. Railroad Comm'n, 279 U.S. 125, 139 (1929). We are therefore bound by the Pennsylvania Supreme Court's holding that the Horse Racing Commission was authorized by the legislature to fix jockey fees.

> *The imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with — indeed, necessary to accomplish these legislative goals.*

422 A.2d at 490-91 (emphasis added).

9. The Pennsylvania Supreme Court also attached importance to the fact that when the legislature amended the Horse Racing Act in 1976, including the section enumerating the powers of the Commission, there was no attempt by the legislature to curtail the Commission's authority to set jockey fees, authority which it had been exercising since 1968. Thus, the court concluded that "the legislature's acquiescence in the Commission's exercise of its rule-making power to set jockey's fees manifests approval thereof." 422 A.2d at 491.

10. In *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 717 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978) we discussed the problem of discerning when state authority to restrain competition exists. We noted that:

> [T]he state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made.

As the *Gilligan* decision demonstrates, the action complained of in this case was clearly contemplated by the legislation in question. Indeed, in this regard *Gilligan* could not have been more explicit.[5]

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5. The degree of articulation and expression by the legislature that is necessary was also stated in City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434-35 (5th Cir. 1976), *aff'd*, 435 U.S. 389 (1978):

> [I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It

11. It is also clear that the jockey fee scale is "actively supervised" by the Commonwealth, within the meaning of that term as set forth in *Midcal*. In *Midcal*, the Supreme Court struck down the California wine-pricing system because the state neither established the prices, reviewed their reasonableness, regulated the terms of the fair trade contracts, monitored market conditions, nor engaged in any "pointed reexamination" of the program in question. 445 U.S. at 105-06. The *Midcal* Court stressed that the state simply authorized price-setting and enforced the prices established by private parties. The Court made clear its concern: "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106.

NOTE — *(Continued)*

> will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to act in a particular area, that the legislature contemplated the kind of action complained of.

Cited in Community Communications Co., Inc. v. City of Boulder, 50 U.S.L.W. 4144, 4146 n.12 (Jan. 13, 1982) (footnote omitted). In *Lafayette*, the Court considered an antitrust counterclaim against two Louisiana cities that allegedly pursued various anticompetitive activities in their operation of electric power companies. The Court agreed that Congress did not intend to exempt local governments per se from antitrust scrutiny. Justice Brennan noted that municipal decisions might express only "purely parochial interests" rather than state policy. 434 U.S. at 416. That concern is not presented in the case of a state agency responsible for articulating statewide policy. *See, e.g.*, Metropolitan Edison Co. v. Public Service Comm'n, 127 Pa. Super. Ct. 11, 191 A. 678 (1937). For a general analysis of the *Lafayette* decision, *see* Areeda, "Antitrust Immunity For 'State Action' After *Lafayette*." 95 *Harv. L. Rev.* 435 (1981).

12. In the instant case, however, there is no question about the Commonwealth's involvement in the challenged activity. The state Commission sets the jockey fees, pursuant to formal notice and hearing procedures. Appendix at 22. Furthermore, the Complaint does not allege a need for more state supervision; it alleges that the present supervision is biased in favor of the jockeys and that the Commission did not exercise sufficient independent judgment over the level of the fee scale. Complaint §§ 19 and 26. Appendix at A-10, A-11, A-12. The record does not support such an assertion. However, even if this averment were true, the promulgation of a jockey fee scale by means of Rule 9.15 differs from the scheme which the Supreme Court struck down in *Midcal*. In *Midcal*, private parties were authorized to set prices by themselves, without the further involvement of the state. Here, the regulation promulgated by the Commission itself contains the fees. There is no such abdication of price-fixing activity to private parties by the Horse Racing Commission. It is the state Commission itself which sets the fees.[6]

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6. The recent Supreme Court decision in *Boulder* is not controlling here. In *Boulder*, the Court held that an ordinance of the City of Boulder, a "home rule" municipality with extensive powers of self-government in local and municipal matters, which restricted the expansion of a cable television business for three months, was not exempt from antitrust scrutiny under the state action exemption of *Parker*. In this case, we are faced with the question of whether a state agency, not a municipality, is entitled to the *Parker* exemption when it acts within its authority under state law. Here, the Pennsylvania Supreme Court has expressly held that the action of the Horse Racing Commission in promulgating a fee schedule for jockeys is within the *sovereign authority* of the Commission under *state* law. The importance of such a distinction was implicitly recognized by the Court in *Boulder* in its discussion of the two situations in which the state action exemption applies:

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny *unless it*

13. The authorities relied upon by appellants are not persuasive in the present context. In many of these cases, the challenged restraint had not been clearly articulated as state policy. For example, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), defendant Detroit Edison gave its customers light bulbs as part of their electric service, and thereby, plaintiffs argued, restrained trade in the sale of light bulbs. The Supreme Court held that Detroit Edison was not exempt from the antitrust laws under the state action doctrine. The plurality attached great significance to the fact that the defendant was a private party, not a state agency or official. 428 U.S. at 591. The plurality also ruled that the decision to provide light bulbs was primarily that of the defendant, and not of the Michigan Public Service Commission, and that the state had no regulatory interest in distributing light bulbs. *Id.* at 484-85. The Michigan statute gave the state Public Service Commission "complete power and jurisdiction to regulate all public utilities in the state," but the statute did not say

NOTE — *(Continued)*

> *constitutes the action of the State of Colorado itself in its sovereign capacity, see Parker,* or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, *see* City of Lafayette, Orrin W. Fox Co., and Midcal.

50 U.S.L.W. at 4146-47 (emphasis added).

Thus, the Court in *Boulder* noted that the *Parker* exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under the federal Constitution. The Court noted that this principle is inherently limited in that "we are a nation of *States*, a principle that makes no accommodation for soverign subdivisions of states." 50 U.S.L.W. at 4146 (emphasis in the original). *Boulder* is instructive in this case insofar as it supports the proposition that interpretation of legislative intent is a matter of state law and that federal antitrust courts should defer to state court interpretations of such questions. 50 U.S.L.W. 4147 nn.15 & 16.

whether a utility should or should not engage in the challenged conduct, *i.e.*, the free distribution of light bulbs, and did not otherwise manifest a regulatory interest in the light bulb market. *Id.* at 584-85. These facts are clearly distinguishable from the case before us. Here, the precise challenged restraint, setting the jockey fee scale, falls within a "general rule making power . . . clearly and unmistakably conferred" by the legislature and which the Commonwealth's highest court has deemed "necessary to accomplish" the goals identified by the legislature in passing the Horse Racing Act. *Gilligan*, 422 A.2d at 490-91.

14. *Stauffer v. Town of Grand Lake* 1981-1 Trade Cases ¶ 64,029 (D. Colo. 1980), also relied upon by appellants, is inapposite as well. In *Stauffer*, the court noted that while a zoning board had broad statutory authority to regulate land use "for the purpose of monitoring health, safety, morals or the general welfare of the community," the Colorado legislature "did not foresee, contemplate or intend" that zoning officials would engage in the conduct complained of in that case: use of their zoning authorization to promote their own interests and economic benefit. *Id.* at 76,330. In the present case, there is no allegation to the effect that the Commission defendants used their authorization to promote their own personal and economic interests.

15. Appellants also argue that there are factual disputes in this case which should have prevented the district court from entering summary judgment and that they should have been given an opportunity for discovery. Both claims are without merit.

16. First, the state action exemption cases clearly indicate that this issue involves a question of law, generally an issue of statutory construction. Thus, the question of

whether a governmental entity is subject to Sherman Act liability has generally been resolved on a motion to dismiss or a summary judgment motion. *See, e.g., Princeton Community Phone Book*, 582 F.2d 706. In the present case, any factual disputes that exist are on matters which are irrelevant to the issue before us: the applicability of the *Parker* doctrine. Second, it is important to note that this case had been pending in the district court for over two years before the summary judgment motion was filed. Plaintiffs chose, however, not to take any discovery in over two years of litigation; rather, they chose to rest on the allegations of the complaint in responding to the summary judgment motion.

17. Finally, appellants argue that the decision in the *Gilligan* case lacks an adequate factual basis and that the Commission never properly explained how its fee schedule deters criminal influence on thoroughbred horse racing. The state action doctrine was developed to avoid this sort of inquiry by federal courts into state legislative wisdom. In *Parker* itself, for example, the Supreme Court did not inquire into the necessity for, or wisdom of, the California marketing programs regulating the sale of certain produce, holding simply that these programs were immune from attack under the antitrust laws. Again, in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court held that the policy of restricting lawyer advertising was affirmatively expressed and actively supervised by the state and thus not subject to antitrust attack. However, the Court did not inquire into the wisdom of this policy. In *Bates*, the Court considered the necessity of the policy; but it did so only to determine whether the state had a compelling interest which could not be advanced by some other means which were less intrusive into the first amendment rights involved in that case. *Id.* at 363-79.

18. The application of the *Parker* doctrine requires a federal court to make only the two determinations articulated in the *Midcal* decision: whether the scheme in question is a clearly articulated state policy and whether it is actively supervised. The district court would not be justified in looking into the wisdom or efficiency of using the regulation in question as a means of accomplishing the intended objectives.[7]

CONCLUSION

19. For the foregoing reasons, the judgment of the district court will be affirmed.

---

7. Appellants also argue the existence of disputed issues of material fact respecting the motivation behind the Commission's amendment of Rule 9.15 in 1978. Again, discovery on this issue would serve no purpose. The Supreme Court has never held that motivation is a factor in the "state action" analysis, apart from the standards outlined in *Midcal*. Furthermore, this theory was not alleged in the Complaint. Appendix at 5-20.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 79-265

EUGENE H. EUSTER, SAMUEL FIERAMOSCA, DANIEL LOPEZ, DAVID HASBANY and MARTIN J. FALLON, JR.

v.

PENNSYLVANIA HORSE RACING COMMISSION; ANDREW R. JOHNSON, Chairman of the Pennsylvania Horse Racing Commission; and A. MARLYN MOYER and WILLIAM D. GROSS, Commissioners of the Pennsylvania Horse Racing Commission

MEMORANDUM OF DECISION

McGLYNN, *J.* July 9, 1981

Plaintiffs have brought this antitrust action against the Pennsylvania Horse Racing Commission and its members challenging the Commission's rule which sets fees to be paid to jockeys. Specifically, plaintiffs allege that the rule violates Section 1 of the Sherman Act, 15 U.S.C. § 1.[1] Defendants have moved for summary judgment, pursuant to Fed. R. Civ. P. 56, on the grounds that (1) the Com-

1. 15 U.S.C. § 1 states in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

mission's liability under the Sherman Act is precluded by the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943),[2] and (2) the injunctive and monetary relief sought against the Commission and its members is barred by the Eleventh Amendment. I hold, for the reasons herein stated, that the defendants are immune from suit under the *Parker* doctrine and, accordingly, summary judgment will be entered in favor of the defendants.[3] I therefore need not reach the issue of whether the Eleventh Amendment bars this lawsuit.

The Pennsylvania Horse Racing Commission was established on December 11, 1967. Act of Dec. 11, 1967, P.L. 707, No. 331, PA. STAT. ANN. tit. 15, §§ 2651-2675 (Purdon Supp. 1981-82) (hereinafter referred to as the "Horse Racing Act"). The fee schedule at issue in the instant case was originally adopted in 1968 and on November 25, 1978 the rule containing the fee schedule was amended to increase the fees. 58 PA. CODE § 163.181.

Several months before the instant action was filed, the Pennsylvania Division of the Horseman's Benevolent

2. While individual members of the Pennsylvania Horse Racing Commission are also named as defendants, both individually and in their official capacity, see Complaint ¶ 5, there is no claim being asserted that these persons engaged in any unlawful conduct. These defendants merely personify the enforcement and regulatory powers granted under the Horse Racing Act. Thus, the only real party in interest is the Commonwealth of Pennsylvania. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977); *Serlin Wine and Spirit Merchants, Inc. v. Healy*, 512 F.Supp. 936, 940 n.12 (D. Conn. 1981). Therefore, a finding by this court that the Commission is immune from antitrust liability will warrant a dismissal of the claims against the individual members of the Commission.

3. Since no genuine issue as to any material fact exists and the question presented by defendants' motion is purely one of law, summary judgment can be granted by the court. Fed. R. Civ. P. 56(c); *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 119 (3d Cir. 1965).

and Protective Association, which represents owners-trainers of racing horses at various tracks in Pennsylvania, and three other individuals filed a lawsuit in the Commonwealth Court of Pennsylvania challenging the authority of the Commission to promulgate a rule setting fees to be paid to jockeys. In an opinion dated October 24, 1979, a panel of three judges of the Commonwealth Court held that the Commission exceeded its legislative authority and could not regulate the amount of compensation paid to jockeys. *Gilligan v. Pennsylvania Horse Racing Comm'n*, 46 Pa. Commw. Ct. 595, 407 A.2d 466 (1979).

On December 4, 1979, less than two months after the decision of the Commonwealth Court, this court ruled on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b). Although I dismissed several claims against the defendants, I refused to dismiss the antitrust claim. In rejecting defendants' argument that the state-action exemption of *Parker v. Brown* applied, I relied on the recent decision of the Commonwealth Court in the *Gilligan* case. In my Memorandum of Decision, I stated the following:

> No state statute authorizes the Commission to set jockey fees. The broad statutory grant of power to the Commission does not mandate control of jockey fees. Indeed, the Commonwealth Court of Pennsylvania held that the Commission exceeded its authority in promulgating the schedule.
>
> > . . . [T]he Act fails to provide express authorization to establish rates of jockey compensation. Absent a specific legislative mandate directing the Commission to establish a jockey fee schedule, we are constrained to conclude that the Commission exceeded its authority . . . *Gilligan v. Pennsylvania Horse Racing Commission*, No. 2665 C.D., slip op. at 2, (Commw. Ct. Pa. Oct. 24, 1979).

> The claim against the Commission does not fall within the *Parker* exception to antitrust liability. The cause of action, therefore, cannot be dismissed for failure to state a claim against the state agency.

Euster v. Eagle Downs Racing Ass'n, C.A. No. 79-265, slip op. at 4 (E.D.Pa., filed December 4, 1979).

The Commission appealed the Commonwealth Court's decision to the Supreme Court of Pennsylvania. On September 22, 1980, the Supreme Court reversed the Commonwealth Court, holding that the Commission was authorized by the Legislature to promulgate a jockey fee schedule. *Gilligan v. Pennsylvania Horse Racing Comm'n*, — Pa. —, 422 A.2d 487 (1980). Justice Kauffman, writing for the court, stated that the Horse Racing Act expressly conferred broad rule making powers on the Commission which included the power to set jockey fees:

> The Act reflects a clear legislative policy to vest the Commission with broad general supervisory powers over the previously unlawful activity of thoroughbred horse racing. . . . A pervasive system of regulation and supervision of this *otherwise criminal activity* was thus contemplated by the Commission's broad legislative mandate, and a general rule making power was clearly and unmistakably conferred. . . .
>
> . . . .
>
> . . . The breadth of the Commission's powers is required for the prevention of corruption and the maintenance of high standards and public confidence in racing. *The imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with—indeed, necessary to accomplish—those legislative goals.*
>
> . . . .

> . . . Moreover, the Legislature's acquiescence in the Commission's exercise of its rule-making power to set jockey fees manifests approval thereof. Indeed, when the Legislature amended the Act in 1976, no effort was made to curtail that authority, even though the section enumerating the powers of the Commission (§ 2652) was among those amended (Act of Dec. 2, 1976, P.L. 1249, No. 276, § 1).

Id. at —, 422 A.2d at 489-90 (emphasis added).

In view of the decision of the Pennsylvania Supreme Court emphatically holding that the Commission had authority to set jockeys' fees, it is now evident that the defendants are immune from antitrust liability under *Parker v. Brown* and, therefore, summary judgment must be granted in their favor.

In *Parker v. Brown*, 317 U.S. 341 (1943), a raisin packer sued the California State Agricultural Commission to enjoin enforcement of the State's Agricultural Prorate Act. The Act authorized that State Director of Agriculture and the Agriculture Commission to adopt marketing programs regulating the sale of certain produce. Plaintiff attacked the program as a violation of the Sherman Act. The Supreme Court held that state regulatory programs, such as the one adopted by California, were immune from the provisions of the Sherman Act. The Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court held that state regulatory programs could not violate it. *Id.* at 352.

Recently, in the case of *California Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court reviewed *Parker v. Brown* and the Court's

subsequent decisions[4] reaffirming *Parker*, and from these cases gleaned the following two-pronged test for determining whether a particular state activity is entitled to antitrust immunity:

> These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

Id. at 105 (citations omitted).

Reviewing the facts of the instant case, I conclude that the above standards have been fully satisfied so that the Commission's jockey fee schedule falls within the antitrust immunity established by *Parker v. Brown* and its progeny. First, the rule establishing jockey fees is clearly authorized, indeed necessitated, by the expression of state policy contained in the Horse Racing Act. As the Supreme Court of Pennsylvania has stated, "[The] promulgation by the Commission of the jockey fee schedule falls *clearly* within its broad grant of legislative authority." *Gilligan v. Pennsylvania Horse Racing Comm'n*, — Pa. —, —, 422 A.2d 487, 491 (1980) (emphasis added). "The imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with—indeed,

4. *E.g., New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). *See also Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978); *Mobilfone of Northeastern Pa., Inc. v. Commonwealth Telephone Co.*, 571 F.2d 141 (3d Cir. 1978); *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975).

necessary to accomplish—these legislative goals."[5] *Id.* at —, 422 A.2d at 490-491. Second, there is no question but that this policy is actively supervised by the state. Indeed, it is the state itself, acting through the Commission, which has created the jockey fee schedule and which enforces it with penal sanctions. *See* 58 PA. CODE § 165.1. In short, the clear articulation and active supervision requirements of the *Midcal* case have been met in the instant case.[6] Accordingly, defendants' motion for summary judgment will be granted. An appropriate order follows.

---

5. In *Gilligan*, the Supreme Court noted the following: "In the exercise of its supervisory responsibilities, the Commission reasonably has concluded that in order to deter criminal influence in the horse racing industry it is vital, *inter alia*, to guarantee adequate fees for jockeys." — Pa. at —, 422 A.2d at 491 n.9.

6. *Cf. Bally Mfg. Corp. v. New Jersey Casino Control Comm'n*, 85 N.J. 325, —, 426 A.2d 1000, 1005-06 (1981) (Two-pronged test of *Midcal* satisfied so that state commission did not violate the Sherman Act when it promulgated a rule prohibiting casinos from acquiring more than 50% of their slot machines from any one manufacturer).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2432

EUSTER, EUGENE H.: FIERAMOSCA, SAMUEL; LOPEZ, DANIEL; HASBANY, DAVID; and FALLON, MARTIN J. JR.

Appellants

v.

EAGLE DOWNS RACING ASSOCIATION, a Pennsylvania Corporation, PENNSYLVANIA HORSE RACING COMMISSION; JOHNSON, ANDREW R., Chairman of Pennsylvania Horse Racing Commission; and A. MARLYN MOYER AND WILLIAM D. GROSS, Commissioners of the Pennsylvania Horse Racing Commission

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(D.C. Civ. No. 79-0265)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HUNTER, WEIS, and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel March 2, 1982,

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 10, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ SALLY MERVOS
Clerk

May 17, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2432

EUSTER, EUGENE H., et al.,
Appellants

v.

EAGLE DOWNS RACING ASSOC., et al.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JAMES HUNTER, III
James Hunter, III *Judge*

Dated: JUN 24 1982

Office - Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS
CLERK

82-501

No.

In the Supreme Court of the United States

October Term, 1982

EUGENE H. EUSTER, SAMUEL FIERAMOSCA, DANIEL LOPEZ, DAVID HASBANY and MARTIN J. FALLON, JR.,

Petitioners

v.

PENNSYLVANIA HORSE RACING COMMISSION; ANDREW R. JOHNSON, Chairman, and A. MARLYN MOYER and WILLIAM D. GROSS, Commissioners,

Respondents

BRIEF OF RESPONDENTS PENNSYLVANIA HORSE RACING COMMISSION, ANDREW R. JOHNSON, A. MARLYN MOYER and WILLIAM R. GROSS, Horse Racing Commissioners, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Where the Pennsylvania Supreme Court has specifically held that a state agency, the Pennsylvania Horse Racing Commission, has authority under state law to promulgate a regulation fixing jockeys' fees, is that agency entitled to the state-action exemption from antitrust liability?

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STATUTES:

Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, No. 240 as amended 45 P.S. §1102, et seq. 6

Race Horse Industry Reform Act, Act of December 17, 1981, P.L. 435, No. 135, 15 P.S. §325.101, et seq. 10

MISCELLANEOUS:

Opinion of the Attorney General of Delaware, Opinion No. 80F-006, 1980-1 Trade Cas. (CCH) ¶63,259 (March 20, 1980) 14

Opinion of the Attorney General of Vermont, Opinion No. 24-80, 1979-2 Trade Cas. (CCH) ¶62,912 (September 6, 1979) 14

COUNTER-STATEMENT OF THE CASE

This action is one of three lawsuits brought by various horse owners and/or trainers in the Commonwealth of Pennsylvania which challenge a regulation promulgated by the Pennsylvania Horse Racing Commission.[1] The regulation in question amends a prior regulation of the Commission first promulgated in 1968, which established riding fees for jockeys.

The amendment to the jockey fee schedule was first proposed at a Pennsylvania Horse Racing Commission meeting on July 19, 1978 and published in the Pennsylvania Bulletin as a proposed regulation on September 2, 1978. At an October 18, 1978 meeting, the Commission adopted the regulation which became effective upon the publication in the Pennsylvania Bulletin on November 25, 1978.

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[1] The first lawsuit commenced was *Gilligan v. Horse Racing Commission*, which was filed on November 18, 1978 in Pennsylvania Commonwealth Court. The second lawsuit is the instant case which was commenced in January, 1979. The third lawsuit was *Horsemen's Benevolent and Protective Ass'n., Inc., Pennsylvania Division v. Pennsylvania Horse Racing Commission et al. (HBPA)*. That lawsuit was commenced in May, 1981 as a class action lawsuit alleging a civil rights violation and violations of federal antitrust laws. Petitioners attempted to withdraw *Euster* and simultaneously substitute *H.B.P.A.* However, the district court denied that motion. Subsequently the Horse Racing Commission filed a motion to dismiss in *H.B.P.A.* which was granted by the district court. The district court's opinion in *H.B.P.A.* was based upon substantially the same rationale as was enumerated in *Euster*. Plaintiffs then appealed the decision of the district court which was affirmed by the Third Circuit.

This action was originally commenced in January, 1979. Defendants included the Pennsylvania Horse Racing Commission, its members, and Eagle Downs Racing Association.[2] Plaintiffs alleged various civil rights violations, violations of federal antitrust laws, and asserted a pendent state claim. The Horse Racing Commission filed a motion to dismiss and the District Court dismissed all claims against the Horse Racing Commission except the antitrust claim. The District Court based its refusal to dismiss the antitrust claim on a decision of the Pennsylvania Commonwealth Court in *Gilligan v. Pennsylvania Horse Racing Commission*, 46 Pa. Commonwealth Ct. 595, 407 A.2d 466 (1979).

Gilligan was filed in Pennsylvania Commonwealth Court several months before the instant case. Plaintiffs, in *Gilligan*, alleged, among other things, that the Pennsylvania Horse Racing Commission had no authority to promulgate a jockey fee schedule. The Pennsylvania Commonwealth Court ruled that without specific statutory language authorizing the Commission to promulgate jockey fees, the Commission was without power in this matter.

Subsequently an appeal was taken by the Horse Racing Commission from the Commonwealth Court's decision. In *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487 (1980), the Pennsylvania Supreme Court reversed the decision of the Commonwealth Court and held that the imposition of a jockey fee schedule was simply part of a comprehensive scheme of regulation consistent with, in fact necessary to accomplish, the legislative goals of the Pennsylvania General Assembly. The

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[2] Eagle Downs Racing Association, a corporation licensed by the Pennsylvania Horse Racing Commission to conduct parimutuel thoroughbred racing in Pennsylvania, was dismissed from this case by order of the district court on December 5, 1979.

Court ruled that a jockey fee schedule was simply one part of a pervasive system of regulation and supervision of an otherwise criminal activity.

In light of the Supreme Court's decision in *Gilligan*, the Pennsylvania Horse Racing Commission filed a motion for summary judgment in this case arguing that the promulgation of a jockey fee schedule was immune from antitrust attack based upon the state action exemption first elucidated in *Parker v. Brown*, 317 U.S. 341 (1943).

The District Court relying in part upon *Gilligan* and upon the decisions of this Court in *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978), and *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum*, 445 U.S. 97 (1980), granted the Commission's motion holding

> "In view of the decision of the Pennsylvania Supreme Court emphatically holding that the Commission had authority to set jockeys' fees, it is now evident that the defendants are immune from antitrust liability under Parker v. Brown, and, therefore, summary judgment must be granted in their favor."

Petitioners filed an appeal to the Third Circuit which affirmed the decision of the District Court. *Euster v. Eagle Downs Racing Ass'n.*, 677 F.2d 992 (3rd Cir. 1982). The Court of Appeals also relied heavily upon the decision of the Pennsylvania Supreme Court in *Gilligan*. The Court of Appeals determined that the ruling in *Gilligan* explicitly demonstrated that the action complained of was clearly contemplated by the Pennsylvania General Assembly and was within the powers of the Pennsylvania Horse Racing Commission. The Court of Appeals then went on to determine that the Horse Racing Commission, an agency of the Commonwealth of Pennsylvania, actively supervised

the jockey fee schedule thereby satisfying the second prong of the *City of Lafayette—Midcal* test.

In its decision the Court of Appeals took great pains to distinguish between the antitrust immunity available to a state agency such as the Pennsylvania Horse Racing Commission and that immunity available to a subordinate creation of the state such as a public utility or a municipality.

Petitioners have filed this petition for writ of certiorari, seeking review of that decision.

ARGUMENT

I. The Decision of the Court of Appeals for the Third Circuit Does Not Conflict With Decisions of Other Courts of Appeal

Petitioners first contend that this Court should grant certiorari because of an alleged conflict among the Courts of Appeal involving immunity from antitrust liability based upon the principles of *Parker v. Brown*, 317 U.S. 341 (1943). Specifically, Petitioners allege that the decision of the Third Circuit in *Euster* is in conflict with the decision of the Fifth Circuit in *United States v. Texas State Board of Public Accounting*, 592 F.2d 919 (5th Cir. 1979), *cert. denied*, 444 U.S. 925 (1979), and the decision of the First Circuit in *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981). An examination of these cases clearly reveals the Petitioners' contention is without merit. No conflict exists.

Texas State Board involved a professional licensing board which proposed a rule prohibiting public accountants from making competitive bids for professional services. However, rules passed by the Board became effective only *after* approval by a majority of licensed public accountants voting on the referendum. As such, the ruling in *Texas State Board* is simply a natural corollary of this Court's decisions in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), and *New Motor Vehicle Bd. of Cal. v. Orrin Fox Co.*, 439 U.S. 96 (1978), and in complete harmony with the decision of the Third Circuit in *Euster*.

Midcal and *New Motor Vehicle Bd.* stand for the proposition that when a state is not acting as sovereign or

has delegated its powers to a subordinate entity, the challenged activity must be actively supervised by the state. In other words, the anti-competitive activity must meet the second criterion for antitrust immunity enumerated in *Midcal* and *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978). The anti-competitive activity in *Texas State Board* was neither undertaken by nor actively supervised by the state. To the contrary, it was action taken by a majority vote of private parties without active supervision by the state. In fact it represents very nearly the same scheme which this Court invalidated in *Midcal*, where a wine pricing system was left entirely to private producers and wholesalers.

The situation in *Midcal* and *Texas State Board* contrasts sharply with the facts at issue in this case. The jockey fee schedule is established, reviewed and enforced solely by an agency of the Commonwealth of Pennsylvania pursuant to the procedures established by Pennsylvania law.[3] It is a regulation of the Commonwealth of Pennsylvania and, unlike *Texas State Board*, it does not represent a delegation of the Commonwealth's authority to a private body.

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[3] The jockey fee schedule was promulgated pursuant to the Commonwealth Documents Law, 45 P.S. §1102, *et seq.*, that Pennsylvania statute setting forth the requirements that Commonwealth agencies must follow in order to enact a regulation. Petitioners as well as representatives of the jockeys were present at both Commission meetings where the schedule was dismissed. Complaint §9. Further, the Commission actively supervises the schedule and may hold hearings regarding violations as was noted in the opinion of the Third Circuit below, *Euster v. Eagle Downs Racing Ass'n.*, 677 F.2d 992, 995 (3rd Cir. 1982). The situation therefore closely parallels that in *New Motor Vehicle Bd. of Cal. v. Orrin Fox Co.*, 439 U.S. 96 (1978).

In addition to failing the second prong of the *City of Lafayette-Midcal* standard, it is doubtful that the rule in *Texas State Board* satisfied the first requirement; that the anti-competitive activity be clearly articulated and affirmatively expressed. The District Court's opinion in *United States v. Texas State Board of Accounting*, 464 F. Supp. 400, 404 (W.D. Texas 1978), which was affirmed by the Fifth Circuit, states "[a]dditionally, it cannot be stated that Section 5 of the [Texas Public Accounting] Act in any way concerns or contemplates 'the kind of action complained of' here." The jockey fee schedule, on the other hand, is clearly articulated and affirmatively expressed as Pennsylvania policy. That was the holding of the Pennsylvania Supreme Court in *Gilligan v. Pennsylvania State Horse Racing Commission*, 492 Pa. 90, 422 A.2d 487 (1980).[4]

Turning to *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981), it is quite obvious that any attempt to create a conflict between *Euster* and *Corey* utterly fails. *Corey* addressed the issue of municipal immunity and turned on the question of whether the Commonwealth of Massachusetts had clearly articulated and affirmatively expressed a policy allowing the town of Falmouth to undertake certain questionable activities, i.e., excluding the plaintiff from bidding to supply a parking garage. The instant case deals with *Parker* immunity available to the Commonwealth of Pennsylvania, not municipalities. Petitioners' arguments notwithstanding, the Horse Racing Commission is part of the Commonwealth of Pennsylvania, *Euster v. Pennsylvania*

[4] The decision of the Pennsylvania Supreme Court in *Gilligan* which expressly stated that the Horse Racing Commission has the authority to promulgate a regulation establishing a jockey fee schedule, and its relationship with this case, are discussed in greater detail in Section II of this brief.

Horse Racing Commission, 431 F. Supp. 828 (E.D. Pa. 1977).[5]

In short, any supposed conflict among the Courts of Appeals created by *Euster* is, in fact, a result of confusion among Petitioners. The decision of Third Circuit in *Euster* is easily harmonized with both *United States v. Texas State Board of Public Accounting*, 592 F.2d 919 (5th Cir. 1979), and *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981).

II. The Third Circuit Decided the Instant Matter in Full Accord With Applicable Precedent

Petitioners next argue that the decision of the Court of Appeals conflicts with several prior decisions of this Court. Though somewhat confused, Petitioners' premise is either that the Pennsylvania Horse Racing Commission should be treated as a municipality for the purpose of anti-trust immunity, or that the Commission's authority to promulgate a jockey fee schedule is not clearly articulated and affirmatively expressed. Both arguments are without merit.

Petitioners contend that there is no principled basis in the precedent of this Court for distinguishing between

[5] The above-cited case involved an action brought against the Pennsylvania Horse Racing Commission, among others, by Eugene Euster, one of the Petitioners in the instant action. Mr. Euster alleged a deprivation of his civil rights pursuant to Title 42 U.S.C. §1983. The court ruled that, although not specifically named as a party, the Commonwealth of Pennsylvania was, in fact, the real party defendant. Thus, the court concluded that the Horse Racing Commission is a part of the Commonwealth. That decision should act as collateral estoppel to any assertion that the Commission is not part of the Commonwealth of Pennsylvania.

state agencies and municipalities. This statement flatly ignores the rulings of this Court in *Community Communications, Inc. v. City of Boulder,* U.S. , 102 S.Ct. 835 (1982); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), and *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum,* 445 U.S. 97 (1980).

In *Midcal* this Court stated:

> . . . immunity for state regulatory programs is grounded in our federal structure. 'In a dual system of government in which, under the Constitution, the states are sovereign save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.' In Parker v. Brown, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against 'individual and not state action,' the Court concluded that state regulatory programs could not violate it.

445 U.S. at 103-04.

Recently, in *City of Boulder,* this Court took great pains to distinguish the antitrust immunity available to a municipality and that immunity available to a state. The distinction is quite simple, a state is sovereign, a municipality is not, but rather a creation of the state. "The state as sovereign is immune from antitrust liability. [T]hus, *Parker* recognized Congress' intention to limit the state action exemption based upon the federalism principle of limited state sovereignty." 102 S.Ct. at 842.

This Court in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), was faced with the question of whether actions of the Arizona Supreme Court were entitled to *Parker v. Brown* immunity. The Court held that the alleged anti-

competitive action was under the affirmative control of the Arizona Supreme Court "the ultimate body for weilding the State's power over the practice of law." It then concluded that the claim was directed against the state, ruling that the Arizona Supreme Court and the state are one and the same.

As in *Bates*, the Pennsylvania Horse Racing Commission is a part of the sovereign Commonwealth of Pennsylvania and cannot be separated therefrom. *Euster v. Pennsylvania Horse Racing Commission*, 431 F. Supp. 828 (E.D. Pa. 1977). Article IV, Section 1, of the Pennsylvania Constitution states that the Executive Department of the Commonwealth shall consist of the Governor, several other specifically enumerated officers, and such other officers as the General Assembly may prescribe. The General Assembly, through the enactment of the Race Horse Industry Reform Act, Act of December 17, 1981, P.L. 435, No. 135, 4 P.S. §325.101, *et seq.*,[8] has provided for the Horse Racing Commission as a part of the Commonwealth of Pennsylvania. Petitioners' arguments to the contrary are simply wrong.

Petitioners' argument, that the Commission's authority to promulgate a jockey fee schedule is not clearly articulated or affirmatively expressed, is rebutted on two counts.

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[8] On December 17, 1980 the Pennsylvania General Assembly repealed the so-called Pennsylvania Horse Racing Act, Act of December 11, 1967, P.L. 707, No. 331, 15 P.S. §2651, and replaced it with the Race Horse Industry Reform Act of December 17, 1981, P.L. 435, No. 135, 4 P.S. §325.101, *et seq.* The Race Horse Industry Reform Act accomplished a number of matters; however, it did not change the powers and duties of the Pennsylvania Horse Racing Commission. The powers of the Horse Racing Commission relied upon by the Court in *Gilligan* are continued verbatim in the Race Horse Industry Reform Act.

First, that test should not be applied to a state acting within its sovereign capacity and, secondly, even if applied, the decision in *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 90, 422 A.2d 487 (1980), has irretrievably disposed of that argument.

Respondents have consistently argued that the standard enumerated in *City of Lafayette* and *Midcal* should not be applied to this case. That language was developed in cases involving public entities created by the state such as municipalities and public utilities. It, therefore, should not be applied where the defendant is the state itself acting pursuant to its authority under state law. In such circumstances there can be no question of active supervision by the state. Thus, the second prong of the *City of Lafayette —Midcal* test is rendered meaningless.

In any case, even applying that standard, the Pennsylvania Horse Racing Commission prevails. Specifically, the assertion that the Commissioners' authority to promulgate a jockey fee schedule is not clearly articulated and affirmatively expressed cannot survive review of the decision of the Supreme Court of Pennsylvania in *Gilligan v Pennsylvania Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487 (1980).

> A pervasive system of regulation and supervision of this otherwise criminal activity was thus contemplated by the Commissioners' broad legislative mandate, and a general rulemaking power was clearly and unmistakably conferred.
>
> * * * *
>
> The latitude of the standards controlling exercise of the rulemaking powers expressly conferred on the Commission must be viewed in light of the broad supervisory task necessary to accomplish the express

> legislative purpose. The breadth of the Commission's powers is required for the prevention of corruption and the maintenance of high standards and public confidence in racing. The imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with—indeed necessary to accomplish—the legislative goals.

492 Pa. at 97, 98, 422 A.2d at 490-91.

Petitioners' contention that the Third Circuit's decision would convert the availability of the *Parker* exemption to a matter of state law misses the point entirely. The issue of whether a state or subordinate government entity such as a municipality is entitled to *Parker* immunity is determined by the application of federal law. However, the first criterion of the *City of Lafayette—Midcal* test, whether the challenged restraint is clearly articulated and affirmatively expressed, is a question of state law dealing with the powers of a particular agency of state government. As such, the first prong of the test must be determined by reference to state law. In the present case, the highest court of the Commonwealth of Pennsylvania has determined, as a matter of state law, that the Horse Racing Commission has authority to promulgate a jockey fee schedule. That determination is binding upon this Court. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

III. This Case Presents No Unresolved Questions of Federal Law Which Should Occasion This Court's Exercise of Jurisdiction

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The final issue is Petitioners' allegation that the recent pronouncements of this Court, involving the antitrust immunity available to municipalities and quasi public en-

tities such as public utilities, have so confused the issue of state immunity that certiorari should be granted to settle the matter. However, the matter of state immunity from the federal antitrust law has been and continues to be well settled.

The original pronouncements of this Court concerning state antitrust immunity made in *Parker v. Brown*, 317 U.S. 341 (1943), are axiomatic. A regulatory program adopted by and supervised by the state pursuant to its sovereign powers is not subject to the Sherman Act. This principle was most recently affirmed in *Community Communications Co. v. City of Boulder*, U.S. , 102 S.Ct. 835 (1982). In *City of Boulder* this Court rejected the automatic extension of *Parker v. Brown* immunity to municipalities, however it expressly reaffirmed that immunity for the states.

> When Parker examined Congress' intentions in enacting the antitrust laws, the opinion noted that 'nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress.' 317 U.S. at 350-351, 63 S.Ct. at 313-14 (emphasis added). Thus Parker recognized Congress' intention to limit the state action exemption based upon the federalism principle of limited state sovereignty.

102 S.Ct. at 842.

The concept of federalism certainly contemplates sovereignty over the pari-mutuel thoroughbred horse racing industry, "an otherwise criminal activity," by the Commonwealth of Pennsylvania, *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 92, 97, 422 A.2d 487,

490 (1980). Further, the Commonwealth of Pennsylvania contemplated the imposition of a jockey fee schedule when it created the Pennsylvania Horse Racing Commission, *Gilligan, supra,* 492 Pa. at 98-99, 422 A.2d at 490-491.

In fact Petitioners cite no cases for their argument that certiorari should be granted to resolve questions raised by recent application of the *Parker* doctrine. Those cases cited elsewhere in Petitioners' brief are, in fact, explicitly harmonized in *Community Communications Co. v. City of Boulder,* 102 S.Ct. at 840-42. The matter of state antitrust immunity continues to be settled pursuant to *Parker v. Brown,* and successive opinions of this Court have so stated.

Finally, the cited opinions of the Attorneys General of Delaware and Vermont are unpersuasive. In both instances the determination turned on the question of whether there was express language authorizing the anticompetitive conduct. As previously discussed, that contention in light of *Gilligan* cannot be seriously debated in this case.

CONCLUSION

For all of the foregoing reasons, petitioners request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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OCT 21 1982

No. 82-501

IN THE

Supreme Court of the United States

October Term, 1982

EUGENE H. EUSTER, SAMUEL FIERAMOSCA, DANIEL LOPEZ, DAVID HASBANY and MARTIN J. FALLON, JR.,

Petitioners

v.

PENNSYLVANIA HORSE RACING COMMISSION; ANDREW R. JOHNSON, Chairman, and MARLYN MOYER and WILLIAM D. GROSS, Commissioners,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, JOCKEYS' GUILD, INC., IN OPPOSITION TO PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-501

EUGENE H. EUSTER, SAMUEL FIERAMOSCA, DANIEL LOPEZ, DAVID HASBANY and MARTIN J. FALLON, JR.,

Petitioners

v.

PENNSYLVANIA HORSE RACING COMMISSION; ANDREW R. JOHNSON, Chairman, and MARLYN MOYER and WILLIAM D. GROSS, Commissioners,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF AMICUS CURIAE, JOCKEYS' GUILD INC., FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION

Amicus curiae, Jockeys' Guild, Inc. ("Guild"), respectfully moves for leave to file the brief attached hereto

in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit by petitioners Eugene H. Euster, Samuel Fieramosca, Daniel Lopez, David Hasbany, and Martin J. Fallon, Jr. (hereinafter collectively referred to as "Horsemen"). The motion is based on the grounds that:

1. Consent to file the attached brief has been denied by one of the parties to this action.

2. The Guild is a national association which provides for the welfare of jockeys in the thoroughbred racing industry. It furnishes (i) representation and, through appropriate insurance carriers, life insurance, health insurance and disability benefits for active jockeys and (ii) direct financial aid for permanently disabled jockeys. The Guild has approximately 1,500 active members. These constitute the vast majority of the active jockeys in the United States. Many of the Guild's members are licensed to ride in Pennsylvania.

3. The instant case centers on the promulgation by the Pennsylvania Horse Racing Commission of Rule of Racing 9.15 ("Rule 9.15") which specifies jockey fees in Pennsylvania. Accordingly, the Guild and its membership have an obvious interest in its fate.

4. The Guild filed a brief and presented oral argument as amicus curiae in the proceedings below in the United States Court of Appeals for the Third Circuit.

5. The Guild was also a defendant in the companion case of *Horsemen's Benevolent and Protective Association, Inc. v. Pennsylvania Horse Racing Comm'n*, 1982-1 CCH Trade Cases, ¶ 64,604 (E. D. Pa. 1982), which was decided on the same ground as the instant case and affirmed by the United States Court of Appeals for the Third Circuit on the authority of its decision in the instant matter.

For the foregoing reasons, the Guild respectfully requests leave to file the amicus curiae brief attached hereto in opposition to the Horsemen's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE, JOCKEYS' GUILD, INC., IN OPPOSITION TO PETITION

Amicus curiae, Jockeys' Guild, Inc. ("Guild"), respectfully submits this brief in opposition to the petition

for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by petitioners, Eugene H. Euster, Samuel Fieramosca, Daniel Lopez, David Hasbany and Martin J. Fallon, Jr. ("hereinafter collectively referred to as "Horsemen"), and respectfully prays that the petition for a writ of certiorari be denied.

INTEREST OF AMICUS CURIAE

The Guild is a national association which provides for the welfare of jockeys in the thoroughbred racing industry. It furnishes (i) representation and, through appropriate insurance carriers, life insurance, health insurance and disability benefits for active jockeys and (ii) direct financial aid for permanently disabled jockeys. The Guild has approximately 1500 active members. These constitute the vast majority of the active jockeys in the United States. Many of the Guild's members are licensed to ride in Pennsylvania.

The instant case centers on the promulgation by the Pennsylvania Horse Racing Commission of Rule of Racing 9.15 ("Rule 9.15") which specifies jockey fees in Pennsylvania. Accordingly, the Guild and its membership have an obvious interest in its fate.

In the proceedings below, in the United States Court of Appeals for the Third Circuit, the Guild submitted a brief and presented argument as amicus curiae. The Guild was also a defendant in the companion case of *Horsemen's Benevolent and Protective Association, Inc. v. Pennsylvania Horse Racing Comm'n*, 1982-1 CCH Trade Cases, ¶ 64,604 (E. D. Pa. 1982), which was decided on the same ground as the instant case and affirmed by the United States Court of Appeals for the Third Circuit on the authority of its decision in the instant matter.

SUMMARY OF ARGUMENT

In the proceedings below, a panel of the United States Court of Appeals for the Third Circuit held that a Pennsylvania statute, as authoritatively construed by the Pennsylvania Supreme Court, "clearly articulated and affirmatively expressed as state policy" the restraint of trade which the Horsemen attack under the antitrust laws. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980) (setting forth standards for "state action" immunity). The court's decision focused primarily on the meaning of the Pennsylvania statute; it raised no issues of novel or general significance for the "state action" doctrine. Notwithstanding the Horsemen's arguments to the contrary, the panel's legal analysis is perfectly consistent with the decisions of courts of appeals for other circuits and with the rulings of this Court. The distinctions between the present case and those cited by the Horsemen in support of their petition are merely factual.

ARGUMENT

The instant case raises no issue of major public importance. The Third Circuit decision is based on an interpretation of a Pennsylvania statute—the Pennsylvania Horse Racing Act ("Horse Racing Act"), PA. STAT. ANN. tit. 15, § 2651 *et seq.* (Purdon) (repealed 1981 and reenacted in pertinent part as the Race Horse Industry Reform Act, PA. STAT. ANN. tit. 4, § 325.101 *et seq.* (Purdon)). The Third Circuit determined that the promulgation of a jockey fee scale by the Pennsylvania Horse Racing Commission ("Commission") was the kind of action contemplated by that statute. *Euster v. Pennsylvania Horse Racing Comm'n*, 677 F. 2d 992, 995 (3d Cir. 1982), *citing Community Communications Co., Inc. v. City of Boulder*, — U. S. —, 102 S. Ct. 835, 840 n. 12 (1982) and *City of Lafayette v. Louisiana Power & Light Co.*, 532 F. 2d 431, 434 (5th Cir. 1976), *aff'd*, 435 U. S. 389 (1978). (Petitioners' Appendix A7-8).

In 1967, the Pennsylvania General Assembly passed the Horse Racing Act, creating the Commission, and charging it with supervising thoroughbred horse racing, which had previously been an unlawful, criminal activity. The statute makes clear that the legislature contemplated a new industry which would be pervasively regulated rather than one which would be subject to the give-and-take of the free enterprise system. Thus, it directs the Commission "to supervise generally all thoroughbred horse racing meetings in this State at which pari-mutuel betting is conducted." PA. STAT. ANN. tit. 15, § 2652. In addition, however, the statute also directs the following anticompetitive activity:

(1) Commission fixes admission charges to race meetings—§ 2652;

(2) Statute restricts those who may own stock in racing association—§ 2654;

(3) Statute limits active racing associations in any one year to six—§ 2655;

(4) Statute prohibits involvement of racing associations in both thoroughbred and harness racing—§ 2655;

(5) Statute prohibits racing association from conducting racing more than 100 days per year—§ 2655;

(6) Statute prohibits license for racing within ten miles of state or county fair without consent—§ 2657;

(7) Commission fixes compensation of stewards, judges and starters—§ 2660;

(8) Commission may license (pursuant to broad standards) trainers, jockeys and other participants, including, at the option of the Commission, owners "and some or all persons exercising their occupation or employed at thoroughbred horse race meets"—§ 2661.

The scope and nature of the Horse Racing Act leave little doubt that the legislature contemplated the issuance of rules by the Commission which would restrain competition and pervasively regulate the previously criminal activity of thoroughbred horse racing.[1] Moreover, the short answer to the Horsemen's contention is that the legislature is not required by the *Parker* v. *Brown* doctrine specifically to authorize the precise restraint in question,

1. Pursuant to its rulemaking authority, the Commission has issued, *inter alia*, numerous rules regulating the conduct of jockeys, for example, the requirement that jockeys be licensed, that no licensed jockey may be an owner or trainer of any race horse, and that jockeys not bet on any race except through the owner or trainer of the horse he or she rides and only on that horse. 58 PA. CODE § 163.171 *et seq.*

in this instance the promulgation by the Commission of the jockey fee scale embodied in Rule 9.15. Thus, for example, in *Community Communications Co. v. City of Boulder*, — U. S. —, 102 S. Ct. 835 (1982), Justice Brennan quoted as follows from the court of appeals decision in *City of Lafayette v. Louisiana Power & Light Co.*, 532 F. 2d 431, 434 (5th Cir. 1976), *aff'd*, 435 U. S. 389 (1978):

> "[I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to act in a particular area, that the legislature contemplated the kind of action complained of."

102 S. Ct. at 840 n. 12.[2] In sum, if the scrutiny of the statute itself leaves any doubt, the intent of the Pennsylvania legislature may be ascertained "from the authority given [to the Commission] to act in a particular area."

In this regard, the construction of the Horse Racing Act by the Supreme Court of the Commonwealth of Pennsylvania in *Gilligan v. Pennsylvania Horse Racing Comm'n*, 492 Pa. 92, 422 A. 2d 487 (1980) is especially relevant. In that case, the court held that promulgation of a jockey fee scale was within the power of the Commission, and moreover, that such action by the Commission was not only appropriate, but also necessary:

> In the exercise of its supervisory responsibilities, the Commission reasonably has concluded that in order

2. In *City of Lafayette*, this Court quoted and expressly approved this standard as "an adequate state mandate for anticompetitive activities of cities." 435 U. S. at 415. *See Areeda, Antitrust Immunity for "State Action" after Lafayette*, 95 *Harv. L. Rev.* 435, 445-48 (1981).

> to deter criminal influence in the horse racing industry it is vital, *inter alia*, to guarantee adequate fees for jockeys.
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> • • •
>
> The breadth of the Commission's powers is required for the prevention of corruption and maintenance of high standards and public confidence in racing. The imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with —indeed, necessary to accomplish—these legislative goals.

492 Pa. at 98 n. 9 and 98, 422 A. 2d at 491 n. 9 and 490-91.[3]

The crux of the instant case, therefore, is nothing more than an interpretation of a specific statute in an effort to determine whether a particular restraint of trade—the promulgation of a jockey fee scale—was affirmatively expressed and clearly articulated as state policy. The lower courts held that it was, and in reaching this decision, they properly deferred to and deemed themselves bound by the Pennsylvania Supreme Court's interpretation of the statute in question. *See, e.g., Community Communications Co., Inc. v. City of Boulder*, — U. S. —, 102 S. Ct. 835, 841 n. 15 (1982) ("But it is not for us to determine

3. The Pennsylvania Supreme Court also held that, by amending the statute, including the section which gives the Commission rulemaking powers, eight years after the Commission had begun fixing a jockey fee scale and not curtailing this authority, the legislature had manifested approval of the practice. 492 Pa. at 99, 422 A. 2d at 491.

The legislature further manifested its approval when it repealed the statute in 1981, re-enacted its provisions in pertinent part as the Race Horse Industry Reform Act, and still did not curtail the authority of the Commission to promulgate a jockey fee scale.

the correct view on [the] issue [before the Court] as a matter of state law,"); *Mullaney v. Wilbur*, 421 U. S. 684, 691 (1975) (federal courts bound by state court's construction of state's statute).

Because the decision in this case rests on the meaning of a state statute, it raises no questions of significance for the nation as a whole. Furthermore, the lower courts did not apply relevant federal antitrust principles in a manner inconsistent either with courts of appeals for other circuits or with the decisions of this Court. On the contrary, what distinguishes cases such as *United States v. Texas State Board of Public Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd as modified*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979), *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), and *Boulder* are merely the factual conclusions, namely the finding in those cases that the challenged restraints had not been articulated clearly as state policy.

Finally, *Boulder* and *Goldfarb* each raised issues of national significance for the "state action" doctrine, the applicability of the antitrust laws to home rule cities and the learned professions respectively. The instant case, by contrast, raises no such issue.

CONCLUSION

For the foregoing reasons, the Jockeys' Guild, Inc., amicus curiae in this action, respectfully urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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